YU CHEE LIENG & ORS

v.

KHING TUNG REALTY SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[COMPANIES WINDING-UP PETITION NO: 28-11-2001-II]
17 JANUARY 2008

COMPANY LAW: *Winding-up - Petition - Opposition to winding-up - Opposition by opposing contributory - Winding-up not disputed by respondent company - Whether respondent company solvent - Whether opposing contributory has on a balance of probability shown a bona fide dispute regarding respondent company's ability to repay debt - No evidence tendered by opposing contributory to dispute debt - Opposition disallowed*

COMPANY LAW: *Winding-up - Petition - Statutory notice - Whether statutory notice must be preceded by letter of demand - No need for creditor to issue letter of demand to debtor before issuing s. 218 notice*

CIVIL PROCEDURE: *Admission by counsel - Effect of - Litigant bound by counsel's admission - Former counsel had conceded that statutory notice for winding-up had been validly served on respondent company - Validity of notice cannot be disputed in light of admission - Litigants bound by what is said in court by their former counsel*

The petitioner issued the winding-up petition in this suit. The respondent did not object to the petition and did not contest the fact that the respondent was unable to comply with the s. 218 notice served on the respondent. However there was an opposing contributory. Learned counsel for the opposing contributory submitted that the court had no jurisdiction to hear the petition as there was a substantial and bona fide dispute of the debts. Learned counsel for the opposing contributory also submitted that the petitioners were not creditors as there had not been a valid assignment of debts by the original creditors. The relevant question for the court to determine was what issue was the opposing contributory entitled to raise in this petition when there was no opposition to it by the respondent itself.

Held (allowing the petition):

(1) The opposing contributory here had not shown in his affidavit evidence that the respondent was solvent and able to pay its debt. The court must be satisfied that the opposing contributory has on a balance of probability shown that there is a *bona fide* dispute on substantial grounds regarding the respondent's ability to repay the

debt in question. The opposing contributory had not discharged his burden of proof in proving that his dispute of the debt was a *bona fide* one. (paras 6, 7 & 9)

(2) The opposing contributory's contention that there must be a letter of demand to the respondent before the issuance of the s. 218 notice by the petitioners to the respondent was without merit. The former counsel for the opposing contributory in fact had conceded that there has been a valid s. 218 notice served on the respondent. Litigants are bound by what was said in court by their former counsel as what they said are presumed to be said with their authority. (para 9)

(3) The only parties entitled to dispute that there had not been a valid transfer of the debts were the original creditors. The respondent who was the debtor of the debts here had no say on the assignment of the debts. The allegation of non existing debts was inconsistent with the stand taken by the opposing contributory in related cases which the court could not ignore. (para 9)

Case(s) referred to:

Lin Shoon Jewellers Sdn Bhd v. Kedai Emas Mee Chan Sdn Bhd [2006] 2 CLJ 644 HC ***(refd)***

Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd [2000] 6 CLJ 290 HC ***(refd)***

Teo Seng Teck v. Yii Chee Ming & Ors [2007] 1 LNS 569 HC ***(refd)***

Yii Chee Ming v. Teo Ah Khing & Anor [2007] 4 CLJ 78 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 152(A), 218(1)(e), (i), (2)(a)

Other source(s) referred to:

Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract, Singapore and Malaysian Edition*, Butterworths 1994, p 724

For the petitioner - Alvin Chong (Alicia Voon with him); M/s Alvin Chong & Partner Advocates

For the respondent - Lim Heng Choo; M/s Lim & Lim Advocates

For the contributory Teo Sing Teck - Makenda Singh Sandhu; M/s Sandhu & Co Advocates

For the contributory Yi Chee Ming - James Lo; M/s George Lo & Partners Advocates

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah J:

Petition

[1] The petitioner took out this petition on 14 June 2001 and on 28 May 2007 amended it which terms are as follows:

[2] The humble Petition of Yu Chee Lieng (WN. KP. 520410-13-5725) of No. 250, Chung Hua Garden, Off Foochow Road No.1, 93300 Kuching, Sarawak, Yii Chi Hau (WN. KP. 490605-13-5245) of 40, Yung Kong Park, Jalan Foochow No. 10, 93300 Kuching, Sarawak, and Yu Chee Hoe (WN. KP. 540721-13-5747) of No. 307, Taman Hock Seng Lee, Jalan Kapor, 93150 Kuching, Sarawak, showeth as follows:

i. Khing Tung Realty Sdn. Bhd. (Company No. 368685-K) (hereinafter called "the company") was on 28 November 1995, incorporated under the Companies Act 1965.

ii. The registered office of the company is at Lot 1004, Jalan Kwong Lee Bank, 93450 Kuching, Sarawak. A copy of the official search of the company made at the Registry of Companies is annexed to this petition and marked "A".

iii. The nominal capital of the company is RM100,000 divided into 100,000 shares of RM1 each. The amount of the capital paid up or credited as paid up is RM100,000.

iv. The objects for which the company was established are to carry on the business of a property investment holding company and for that purpose to acquire and hold properties and other objects as set forth in the Memorandum of Association thereof. A copy of the Memorandum of Association of the Company is annexed to this Petition and marked as "B".

v. At ~~all material times to~~ the date of this petition, the respondent is indebted to the 1st petitioner in the sum of RM122,862, the 2nd petitioner in the sum of RM2,723,652.25 and the 3rd petitioner in the sum of RM1,418,618 being loans granted by the 1st petitioner, 2nd petitioner and 3rd petitioner to the respondent ~~all on 30 day of June 1996~~. These loans are repayable on demand. A copy each of the company's balance sheet as at 31 December 1996 and the company's general ledger for the year ending 31 December 1996 are annexed to this petition and marked "C1" and "C2" respectively, a copy each of the company's audited accounts for year ending March 1998 and the company's management accounts for

year ending March 1998 are annexed to this petition and marked "C" and "D" respectively, and a copy each of the company's balance sheet as at 31 March 1999 and the company's general ledger for the year ending 31 March 1999 are annexed to this petition and marked as "D1" and "D2" respectively.

vi. Your petitioners have, by statutory notices all dated 9 June 2000, pursuant to s. 218 of the Companies Act 1965, served on the company by way of personal service all on 9 June 2000 at its registered office address at Lot 1004, Jalan Kwong Lee Bank, 93450 Kuching, Sarawak, made a demand on the company for payment of the sums of RM122,862, RM2,723,652.25 and RM1,418,618 respectively being the amounts due pursuant to monies advanced and paid on the respondent behalf for the purchase of lands, namely, Lots 1203, 153, 395 and 819 all of Block 10 Kuching Central Land District and payment for other expenses within twenty-one days from the date of service of the said notices but the company has failed, refused and/or neglected to pay the same or any part thereof. A copy each of statutory notices are annexed to this petition and marked as "E", "F" and "G" respectively.

vii. The process server has also affirmed a statutory declaration on 11 April 2001 stating that he has duly served the said notices pursuant to s. 218 of the Companies Act 1965, on the company all on 9 June 2000. A copy of the statutory declaration is annexed to this petition and marked as "H".

viii. The company is unable to pay its debts.

ix. Your petitioners therefore contend and will contend that as the company is unable to pay its debts, it should be wound up pursuant to s. 218(1)(e) of the Companies Act 1965. Alternatively, your petitioners contend and will contend that it is just and equitable to wind up the company pursuant to s. 218(1)(i) of the Companies Act 1965.

x. Your petitioners, therefore, humbly pray as follows:

(a) that Khing Tung Realty Sdn. Bhd. (Company No. 368685-K) may be wound up by the court under the provisions of the Companies Act 1965;

(b) that Ooi Chee Kun (NRIC No.520911-08-5383) and Khoo Pek Ling (F) (NRIC No. 521119-08-5894) both of Folks Management Services Sdn. Bhd., Suite 4024, 4th Floor, President House, Jalan Sultan Ismail, 50250 Kuala Lumpur,

West Malaysia, may be appointed as the Liquidators of the Company in place of the official receiver subject to all those powers provided for specially under Companies Act 1965;

(c) that the petitioners and all supporting creditors be allowed the costs of and incidental to the winding-up which is to be taxed by the proper officer of the court and paid by the liquidators out of the assets of the company;

(d) or that such other order may be made in the premises as shall be just; and

(e) that the liquidators be at liberty to apply.

Respondent's Stand

[3] Mr. Lim Heng Choo, counsel for the respondent, from the outset informed the court that they have no objection to the petition as they are not contesting the fact that the respondent is unable to comply with the s. 218 notice served on the respondent on 9 June 2000. By this stand, the petitioners have established a *prima facie* case to have the respondent wound up under s. 218 of the Companies Act, 1965. That of course is not the end of the story in this petition as two contributories have appeared in this proceeding, one (Mr. Yii Chee Ming) supporting the petition (supporting contributory) while the other (Mr. Teo Sing Teck) opposing it. (opposing contributory)

Contributory's Rights In This Petition

[4] The law is clear in that contributories to the respondent are entitled to appear in this petition and oppose the same. The relevant question in my view is what are they entitled to raise in this petition when there is no opposition to it by the respondent itself. This question was recently considered in the case of *Lin Shoon Jewellers Sdn Bhd v. Kedai Emas Mee Chan Sdn Bhd* [2006] 2 CLJ 644. The facts there are similar to the case at hand and they were these. A creditor presented a creditor's petition against the respondent company after a demand was made against the respondent under s. 218(2)(a) of the Companies Act 1965 ('the Act') for a sum of RM7,000,000 which sum was a debt owed by the respondent to the petitioner and acknowledged by the respondent in a settlement agreement. The petition was not opposed by the respondent but by a contributory of the respondent.

[5] Ramly Ali J answered the just posed question by me at pp. 650-652 in the following manner:

> Based on the above considerations, the court is of the view that in winding-up proceedings against a company, be it a creditor winding-

up or otherwise, a contributory is entitled to appear and oppose the petition for winding-up notwithstanding whether the respondent itself appear and oppose the petition or not. But the court must impress here that such right to appear and to oppose the petition is not without limitations. A contributory is entitled to appear and to oppose the petition so as to safeguard his interest as a contributory in the winding-up process. Whatever issue raised by a contributory in opposing the petition must relate to his interest as a contributor, not otherwise. It is to be noted that in a winding-up, the interest of the creditors is the paramount consideration. So, even though a contributory is allowed to appear and to oppose the petition, it must be limited to issues that touched only on his interest as a contributory. To allow a contributory, unlimited right to raise any issue in opposing the petition may be inconsistent with the basic rights given to the creditors in a winding-up proceeding.

In all creditor's winding-up proceedings the petition is filed on the ground that the respondent is unable to pay its debts or in other words, the respondent is insolvent. In cases where the respondent company is insolvent, there will be no surplus of assets at the end of the liquidation process. In such a situation, if the company is limited by shares and if the contributory has fully paid for his shares in the company, then there is nothing more that he needs to contribute after winding-up order has been granted. His liability as a contributory is nil. It is not a surprise that there are very few cases where contributories have sought to appear on creditor's petition which are based on the ground that the company is insolvent ie, unable to pay its debts. They will generally have no interest to do so where they accept that their company is insolvent. His rights and interest in the winding-up process can only arise if the company is solvent and there will be surplus of assets at the end of the liquidation process which can be distributed among the contributories. That being the case, in cases where a contributory has fully paid for his shares in the company, he must first show that the company to be wound-up is a solvent company and there is a likelihood that there will be surplus of assets at the end of the liquidation process, available for distribution among all the contributories, before he can be allowed to proceed with his opposition of the petition. He must satisfy the court that he has a genuine interest in the result of the winding-up.

In re Rica Gold Washing Co. [1879] 11 Ch D 36 it was decided that a contributory when petitioning for a winding-up of a company must plead in his petition and prove by evidence that, if a winding-up order is made, there is a contingent surplus of assets in the winding-up which will be available for distribution to him. Subsequently, in *In re Rodencraft Ltd*, Evans-Lombe J affirmed that:

> there seems no reason why the rule in *In re Rica Gold Washing Co.* should not extend to contributors seeking to appear on creditor's petitions. His Lordship Evans-Lombe J further held that:

> Thus the petitioner in either of those two classes of petition should not be put to the cost of a contested petition where the only opposition is from a contributory who cannot demonstrate that the company is solvent so that he has a genuine interest in the result.

The above authorities seem to be consistent with the findings that the grounds upon which a contributory could oppose the winding-up of the company must be confined to matters "which affect his interest as a contributory and not matters going to the issues of liability of the company to pay its debt. This is especially so when, as in this case, the respondent itself has not disputed the debts in this petition.

In the present case, the opposing contributory has not provided any evidence in his affidavits to show that the respondent is solvent and able to pay it's debts. Therefore, applying the above principle and supported by a authorities cited above, the court is satisfied that the opposition put by the opposing contributory to the present creditor's petition must fail.

[6] I have no reason to dispute the correctness of the principle of law as stated by his Lordship in the just quoted case. In fact I am of the view that that is the correct statement of law. As in that case, the opposing contributory here had not shown in his affidavit evidence that the respondent "is solvent and able to pay its debt" and applying the above principle of law, I am left with no alternative but to dismiss his opposition to this petition.

Opposing Contributory's Contention

[7] Though what I have stated above is enough for me to approve the prayers prayed for in the amended petition, but for completeness sake, I will deal with what the learned counsel for the opposing contributory, Mr. Makenda Singh Sandhu (Mr. Sandhu) had submitted to the court which in substance states that this court has no jurisdiction to hear this petition as there is a substantial and *bona fide* dispute of the debts. In dealing with Mr. Sandhu's contention, I adopt the approach of Ramly Ali J in *Lin Shoon Jewellers Sdn Bhd v. Kedai Emas Mee Chan Sdn Bhd (supra)* and that is this court must be satisfied that the opposing contributory had on a balance of probability shown that there is a *bona fide* dispute on substantial grounds regarding the respondent's ability to repay the debt in question.

[8] In disputing the debt of the respondent, Mr. Sandhu submitted that there was no debts as the funds for the purchase for the lands in the respondent did not come from the petitioners since there was no valid assignments of these debts by the original lenders of the loans and the debts were tainted with illegality.

[9] Having read the affidavits filed by the petitioners and the opposing contributory and the submissions from Mr. Sandhu, Mr. Alvin Chong, learned counsel for the petitioners and Mr. James Lo, learned counsel for the supporting contributory, I came to the conclusion that the opposing contributory had not discharged his burden of proof in proving that his dispute of the debts is a *bona fide* one and I say so for the following reasons:

i. Mr. Teo Sing Teck, the opposing contributory had signed two important documents, namely the respondent's circular resolution pursuant to s. 152(A) of the Companies Act 1965 dated 28 May 1997 which is exh. 'YCH1' in exh. P1 and the audited accounts of the respondent for the year 1996 which is exh. 'YCH2' in exhibit P1. Both these documents confirmed unequivocally that the respondent had borrowed a sum of RM4,655,593 for the purchase of the lands presently in the books of the respondent. The opposing contributory was and still is a director of the respondent and in signing the annual accounts; he had in fact declared that the contents therein at p. 3 of YCH2 gave a "true and fair view" of the financial affairs of the respondent. Not only that, KPMG Peat Marwick, the auditors of the respondent had also made the same declaration and no attempt was made by the Mr. Sandhu to subpoena anyone from that firm to testify which in my view must be done if there is a *bona fide* dispute to the debts. It is not enough to affirm in an affidavit that he was informed by Mr. Yii Chee Ming, the supporting contributory that there was in fact no creditors and that the entries were made for accounting purposes. This allegation was in fact denied by the supporting contributory.

ii. Mr. Sandhu's contention that there must be a letter of demand to the respondent before the issuance of the s. 218 notice by the petitioners to the respondent is without merit. The former counsel for the opposing contributory, Mr. Alvin Yong, in fact had conceded that there has been a valid s. 218 notice served on the respondent and this can be seen from this part of the notes of proceedings on 12 January 2006:

> Mr. Yong: I have instructions on the following matters. If the Petitioners are relying on the presumption on Section 218, my instruction is, we wish to cross-examine the Petitioner first. If the Petitioner is not presented to us for the cross-examination, we will apply for the cross-examination on the grounds that the Petitioners have affirmed the Affidavit verifying the winding up petition. That is my stand.

Court: Do you dispute that the statutory notice had been served on the company? A

Mr. Yong: No.

Court: As the statutory notice had been served and not replied to (in this case the company are not objecting to it), has the legal presumption of inability to pay arisen as far as the winding up proceedings is concerned? B

Mr. Yong: Yes, the legal presumption of the company inability to pay has arisen as prescribed by section 218(2) of the Companies Act. C

Court: Do you then concede that in view of the presumption there is *prima facie* case for the company to be wound up?

Mr. Yong: Yes. D

Let me say here that litigants are bound by what was said in court by their former counsel as what they said are presumed to be said with their authority. Hence for Mr. Sandhu to say something different here is not only improper, it just shows that the opposing contributory is not sure of his own case and conducting his litigation on an *ad hoc* basis. E

In any event, the law is against Mr. Sandhu's contention and this is clear from the case of *Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd* [2000] 6 CLJ 290 where Mohd Ghazali J (as he then was) held as follows: F

> From the failure of the company to pay as demanded, it is presumed that the company is unable to pay its debts. How that notice, statutory it may be, can be said to be *prima facie* evidence of the debt escape me. It is nothing more than a letter of demand sent by solicitors for the Petitioner to invoke the presumption of inability to pay debts. G

iii. Mr. Sandhu had also submitted that the petitioners are not creditors as there have not been a valid assignment of debts by the original creditors, namely Hock Seng Lee Machinery Sdn Bhd and Huten Marine Sdn Bhd which can be considered as the petitioners' family owned and controlled companies. Again I see no merit in this contention for the simple reason that the only parties entitled to dispute that there had not been a valid transfer of the debts are the original creditors. The respondent who is the debtor of the debts H I

here had no say so to speak on the assignment of the debts. As pointed out in *Cheshire, Fifoot and Furmston's Law of Contract, Singapore and Malaysian* Edition by Andrew Phang Boon Leong, Butterworths 1994 at p. 724:

> Where there is a contract between the owner of a chose in action and another person which shows clear intention that such person is to have the benefit of the chose, there is without more, an assignment in equity. It follows therefore that to perfect the title as between assignor and assignee no notice to the debtor is necessary. The object of the notice ... is to prevent the debtor from paying the assignor, and also to give the assignee priority over other assignees.

iv. The allegation of non existing debts is inconsistent with the stand taken by the opposing contributory and his brother Teo Ah Khing in related cases which this court cannot ignore. These related cases are *Teo Seng Teck v. Yii Chee Ming & 4 Ors* [2007] 1 LNS 569 (26-03-2000-III(I)) and *Yii Chee Ming v. Teo Ah Khing & Anor* [2007] 4 CLJ 78. In both cases which concerned the opposing contributory's 1 share in the respondent, he did not at any time disputed the debts in question. What in fact was alleged in the related cases was that the opposing contributory's 1 share in the respondent was in fact a gift from the supporting contributory who had promised that the lands injected into the respondent will be fully funded by him. In *Yii Chee Ming v. Teo Ah Khing & Anor (supra)*, I rejected the contention and in doing so I said:

> For the Khing Tung Realty Share, the claim by TAK was framed in the following manner: "a declaration that the 1 share in Khing Tung Realty Sdn. Bhd and all the interest and benefits attached thereto is a gift to the 1st Defendant who in turn gave it to the 2nd Plaintiff by Counterclaim, Teo Sing Teck ... .
>
> From the pleadings and the evidence given in court, TAK's claim in substance was a breach of promise on the part of Dennis to pay on his behalf half of the funds required to inject the four properties in Khing Tung Realty Sdn Bhd. The way the claim was framed does not reflect that. What the plaintiff was asking the court to do was to declare that the 2nd plaintiff in the counterclaim had half interests in the aforesaid four properties free from encumbrances by virtue of Dennis's promise. The law is clear about the interests and benefits of shareholders in a company and that is assets in the company do not belong to the shareholders, they belong to the company.

For TAK to say that this was the first time he had seen paragraph 8 (of Teo Sing Teck's Oppression Petition) speaks volume on his credibility or rather the lack of it as a witness of truth. He had filed 38 pages of affidavit in support of the oppression case and there can be no doubt to this court that TAK was the main and only protagonist for all suits filed between the parties. Paragraph 8 actually debunks TAK's claims because if one accepts the truth of it, it says that Dennis was required to fund the development of the four properties which was different to providing the funds for the purchase of the four properties.

Further in his reply to Dennis's counterclaim to the counterclaim, TAK at paragraph 5 stated that the Khing Tung share was to spur him on to work closely with Dennis. Compared this to his affidavit dated 15.9.99 (enclosure 208 page 25) in which he stated at paragraph 38 that 'In light of the various things I have done for the plaintiff, his family and HSLB, in particular HSLB's listing on the KLSE and as a result of his promises to take care of me, the plaintiff made the following gifts to me'. In paragraph 39, he listed the share in Khing Tung Realty as one of those gifts.

There is a difference between gifts for services rendered and gifts to spur TAK to work harder. One can say that TAK was actually blowing hot and cold and when a litigant does that, it only means he was not sure of his case. In my view he was trapped by what he had stated in the just mentioned affidavit because as rightly pointed out by Mr James Lo, in November 1995 he had hardly provided any services to Dennis and his family companies and to wriggle out of that trap he had to change his stand.

[10] For all the above reasons, I grant prayers 10(a), (b), (c) and (e) of the amended petition.